SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971
NO.

FRANK J. REAM, *Petitioner*

v.

THE PEOPLE OF THE STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

FRANK O. WALTHER
Attorney for Petitioner

124 Booth Lane
Haverford, Pennsylvania 19041
Telephone: (215) MI-9-0542

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX

	Page
Petition for Writ of Certiorari	1
Citations to Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Statutes involved	2
Questions Presented	3
Reasons for Granting Writ	7
Conclusion	21

APPENDIX

Constitution of United States	A1
Article 4	A1
Amendment V	A1
Amendment VI	A2
Amendment XIV	A2
Ohio Revised Statutes	A3
Chapter 4731	A3
Section 4731.01	A3
Section 4731.09	A3
Section 4731.15	A4
Section 4731.39	A5
Section 4731.40	A5
Section 4731.41	A6
Chapter 2937	A6
Section 2937.02	A6

APPENDIX—(*Continued*)

Page

Section 2937.10 ..... A7

Section 2945.67 ..... A7

Section 2945.68 ..... A8

Indictment A9

Order Quashing Indictment A10

Order Allowing Filing of Bill of Exceptions A11

Permission to File Bill of Exceptions A13

Order Reversing Judgment and Vacating Demurrer A14

Memorandum Opinion A15

Appeal from the Court of Appeals A20

Mandate of Supreme Court of Ohio A21

Order Overruling Motion A22

Order Overruling Motion A23

Motion to Appeal Overruled A24

Order of Supreme Court of Ohio Dismissing Appeal ... A25

TABLE OF CITATIONS

Cases:

Amos v. United States, 255 U.S. 313 17

Berry v. Summers, 76 Idaho 446 13

Blake v. McClung, 172 U.S. 238 11

Crider v. Maxwell, 174 Ohio St. 190 15

East Coast Lumber Terminal v. Babylon, 174 F. 2d 106 15

Eastman v. State, 131 Ohio St. 1 18

Cases: Page

England v. Louisiana Board of Medical Examiners 263 F. 2d 676 8

Euclid v. Heaton, 15 Ohio St. 2d 65 18

Goodwin v. Page, 296 F. Supp. 1205 15

Gouled v. United States, 255 U.S. 298 17

Hayden v. Mississippi, 81 Miss. 291 12

James v. United States, 348 F. 2d 430 18

Kress & Co. v. Sharp, 126 So. 650 13

McFalls v. Peyton, 270 F. Supp. 572 15

New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552 11

Ohio v. Catt, Licking Co., Ohio 9

Ohio v. Codman, Van Wert Co., Ohio 9

Ohio v. Butler, Bucyrus, Ohio 9

Ohio v. Boyed, Urbana, Ohio 9

Ohio v. Gainey, Persy Co., Ohio 9

Ohio v. Gravett, 65 Ohio St. 289 ..... 10, 12, 20

Ohio v. Hall, Belmont Co., Ohio 9

Ohio v. Homan, Hardin Co., Ohio 9

Ohio v. Krienbrook, Belmont Co., Ohio 9

Ohio v. Lorr, Cuyahoga Co., Ohio 9

Ohio v. Meyer, 69 Ohio App. 344 15

Ohio v. Novak, Green Co., Ohio 9

Ohio v. Ream, U.S. Supreme Court, Oct. Term 1970, No. 70-5259 9

Cases:

Ohio v. Sprague, St. Mary's, Ohio
Ohio v. Stewart, Hardin Co., Ohio
Ohio v. Stiers, Muskingam Co., Ohio
Ohio v. Stocker, Hancock Co., Ohio
Ohio v. Young, Mt. Vernon, Ohio
O'Dell v. Ohio Medical Board, U.S. Supreme Cou
No. 71-5682
Ream v. Ohio, U.S. Supreme Court, No. 70-5259
State v. Armstrong, 38 Idaho 493
State v. Minamyer, 12 Ohio St. 2d 67
State ex rel. Medical Board v. Smith, 81 Idaho 103
United States v. Harris, 106 U.S. 629
United States ex rel. Weber v. Ragen, 176 F. 2d 51
United States v. Walker, 346 F. 2d 428
Varley's Will, In re, 46 N.E. 2d 878
Whitfield v. Ohio, 297 U.S. 431
Williams v. Bornemeier, No. 71-99, U.S.D. Ohio
Williams v. Mississippi, 170 U.S. 356
Yick Wo v. Hopkins, 118 U.S. 356

Constitution of U.S.:

Article IV, section 2
Fifth Amendment
Sixth Amendment
Fourteenth Amendment 2

	Page
	9
	9
	9
	9
	9
Court,	
	9, 11
	5
	13
	14
03	13
	11
d 519	15
	18
	19
	11
	9
	11
	11
	2, 4, 11
	2
	2
	2, 11, 15

Ohio Statutes:

Chapter 2937

Section 2937.02 (D)

Section 2937.10

Chapter 2945

Section 2945.67

Section 2945.68

Section 2945.70

Chapter 4731

Section 4731.01

Section 4731.09

Section 4731.39

Section 4731.40

Section 4731.41

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971
NO.

FRANK J. REAM, *Petitioner*

v.

THE PEOPLE OF THE STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF THE STATE OF OHIO

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, FRANK J. REAM, prays that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Third Judicial District of the State of Ohio, entered in the above entitled case on November 16, 1970. The judgment reversed and vacated an order of the Court of Common Pleas for Hancock County which had dismissed an indictment on the grounds of harassment and double jeopardy.

CITATIONS TO OPINION BELOW

The order and memorandum opinion of the Court of Common Pleas quashing the indictment is printed in the Appendix herein at p. App. 10, infra. The order of the Court of Appeals from which review is sought is printed in the Appendix hereto at p. App. 12, and the memorandum opinion at pp. App. 13 et seq. infra. An application for leave to appeal to the Supreme Court of Ohio was overruled by that Court on November 26, 1971. Appendix, p. App. 24. The Appeal was dismissed on the same date. Appendix, p. App. 25.

JURISDICTION

The Judgment of the Court of Appeals for the Third Judicial District of Ohio was entered on August 9, 1971. Appendix, App. 22, et seq. infra. Review was denied by the Supreme Court of Ohio on November 26, 1971. Appendix, App. 25, infra. The jurisdiction of this Court is invoked under Title 28, U.S.C., section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions involved are Article IV, section 2, The Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. The Ohio statutes involved are sections 2937.02(D), 2937.10, 2945.67, 2945.68, 4731.01, 4731.09, 4731.39, 4731.40, 4731.41, of the Ohio Revised Code. They are printed in Appendix hereto at App. p. 1 to App. p. 8, inclusive.

QUESTIONS PRESENTED

I

Whether, constitutionally, the State of Ohio can grant a monopoly to one school of healing over another school it has avowed to put out of business by all means available until the intent is accomplished.

II.

Whether, constitutionally, the school granted the monopoly can use the enforcement of the criminal statutes of Ohio, through the Ohio Medical Board composed exclusively of its members, to accomplish its avowed objective, the destruction of the school dominated.

III.

Whether, constitutionally, such medical board can instigate a criminal complaint against a member of the dominated school where no probable cause appears on the record.

IV.

Whether, constitutionally, where a State statute makes a preliminary hearing mandatory to all persons accused of a felony, this can be denied in the discretion of the prosecution to avoid confrontation and cross-examination of witnesses and dismissal of the complaint.

V.

Whether, the constitutional right to a fair trial is denied on an indictment with two counts so conflicting

and repugnant to each other as to preclude a defendant from testifying as to one count without confessing to the other offense charged in the second count.

VI.

Whether, in a trial for practicing medicine without a license, a person can be made to run the gauntlet in a multiplicity of separate trials concerning a series of patients he treated without violating the Double Jeopardy Clause of the Fifth Amendment of the Constitution.

VII.

Whether, constitutionally, an Appellate Court can assume Appellate Jurisdiction in an appeal by the State, against a dismissal by a trial court of a criminal prosecution, under a Statute permitting the trial judge to appear and defend, but not the accused so to do.

On February 9, 1970, the medical inspector for the Ohio Medical Board filed in the Muncipal Court of Finlay, Hancock County, Ohio a complaint against petitioner, a doctor of chiropractic, licensed to practice by the State of Alabama, for practicing, on or about October 28, 1969, medicine or surgery, or any of its branches, without a license, and for opening or conducting at the same time, an office for such purpose, in violation of section 4731.41 of the Ohio Revised Code. He is one of the many chiropractors, who moved to Ohio from other states believing that under Article IV, section 2, of the Federal Constitution when he so moved to Ohio that whatever those rights, as are granted or established to Ohio citizens, or are limited or qualified, or restricted as to their exercise, the same, neither more nor less, would be the measure of his right as a citizen of another state within the jurisdiction of Ohio. It turned out that Ohio did not, in fact, recognize Article IV, section 2 of the Constitution as to chiropractors moving there from other states. In-state chiropractors are given certificates to practice after an examination of

the following qualifications: 1. A high school education or its equivalent. 2. A degree from a recognized chiropractic college or school. 3. Submit documentary evidence of a residence course in anatomy, physiology, bacteriology, pathology, hygiene and diagnosis and, 4. to satisfy the medical board concerning the character and moral standing of the applicant. These rules are not applied to the chiropractor from out of Ohio who desires to remove to Ohio. To the citizen of another state the following qualifications are required in addition to those above: (1) Two years of college work in an approved college of arts and sciences, and (2) the applicant must produce a diploma from a medical institution in good standing approved by the medical board. The purpose of the invidious discrimination against chiropractors from out of state and to discourage their coming into Ohio to live, can be found in the positive Resolutions of the American Medical Association and the Ohio State Medical Association to "put chiropractic out of business."

Petitioner had already been convicted in Hardin County, Ohio, on September 8, 1970, for the same offense and had received a suspended sentence conditioned on his desisting thereafter from practicing his profession in Ohio. (cf. Ream v. Ohio, this Court, Oct. Term, 1970, No. 70-5259).

As in the prior case, petitioner moved the second complaint to be set aside on the grounds that the medical Act was, as to doctors of chiropractic, unconstitutional, but before the Municipal Court could rule on the motion, or hold the mandatory preliminary hearing, the prosecuting attorney, to prevent such hearing, quickly brought the matter before the grand jury and procured an indictment. The purpose was to deny the mandatory preliminary hearing provided for by sections 2937.02 and 2937.10 of the Ohio Revised Code. This deliberate switch in procedure removed the case from the jurisdiction of the Municipal Court to that of the Court of Common Pleas of Hancock County, Ohio.

The indictment contained three counts. (Appendix, App. 9). The first count charged petitioner with practicing medicine on October 14, 1969, without a license. The second count charged him with opening or conducting an office for such purpose, without a license. The third count charged him, instead, with a different offense, the conducting an office for such purpose at the same time, in the name of another person, Dr. Gary W. Stocker, who is a doctor of chiropractic licensed to practice in Ohio.

Petitioner filed a demurrer to the indictment on the same constitutional grounds as in his motion to dismiss the complaint. He also filed a motion to quash the indictment and dismiss the prosecution on the grounds of repugnant conflict of counts two and three thereof as well as on the ground that he had been denied his mandatory statute right to a Preliminary Hearing given him by sections 2937.02(D) and 2937.10 of the Ohio Revised Code, wherefor no probable cause had been established for the search, arrest, prosecution or presentment to the Secret Grand Jury. Petitioner further filed a motion to submit, and a proffer of testimony in support of his allegations in his demurrer that the Medical Act as to him was unconstitutional, as to the professional constraint on the members of the Medical Board to follow a policy inimical to his own profession, and as to the administration of the Act by such Board with an evil eye and unequal hand in invidious discrimination of him and members of his own profession.

On July 6, 1970, the Trial Court sustained the motion of petitioner to quash the indictment and dismissed the prosecution on the grounds of unauthorized harassment.

The prosecuting attorney then appealed to the Court of Appeals, Third Appellate District of Ohio, which on November 16, 1970 granted him leave so to do. Petitioner appealed such action to the Supreme Court of Ohio, on the grounds that the Act (Section 2945.67 of the Ohio Revised Code) authorizing the granting of such an appeal was unconstitutional because, although authorizing the

Judge of the Trial Court to defend against such appeal, the Act failed to authorize the petitioner, himself, to appear and defend, which omission the Court of Appeals was powerless itself to remedy without resorting to judicial legislation. The Supreme Court of Ohio denied the petitioner a hearing.

The Court of Appeals on July 1, 1971, reversed the Trial Court's dismissal of the prosecution, and further itself overruled petitioner's demurrer and motions to quash the indictment and dismiss the prosecution. On July 20, 1971, it denied an application of petitioner for a rehearing and reconsideration, and on August 9, 1971, denied his application for a Certificate of Conflict, between the decision of such Court of Appeals and the decision (cited by such court) of the Court of Appeals of the Eighth Appellate District of Ohio.

On November 26, 1971, the Supreme Court of Ohio dismissed petitioner's appeal thereto on the grounds that no substantial constitutional question existed therein.

Over the objection of the petition of counsel for petitioner to the trial judge, the petitioner was arraigned on December 10, 1971, at which time he refused to enter a plea and stood mute, and the trial judge thereupon entered a plea for the petitioner of "not guilty." Petitioner entered his objection thereto on the grounds that he saved his right not to waive his as yet denied mandatory statutory right to a preliminary hearing, since an entry by him of a plea, under Ohio decisional law, constitutes such a waiver to such a right.

REASONS FOR GRANTING WRIT

I

This petition is of broad interest and concern. This case is not an isolated incident where a chiropractor is

prosecuted for violating the law but merely one of the many criminal cases in Ohio instigated, not to obtain valid judgments, but to accomplish the intent and purpose of the American Medical Association, the Ohio State Medical Association, operating through their members who have exclusive jurisdiction as the Ohio Medical Board over all schools of the healing art. These criminal prosecutions of chiropractors in Ohio were for the purpose of these associations to put chiropractic "out of business" and by "all means available" until this intent and purpose is "accomplished." Journal of American Medical Association, April 17, 1967, Vol. 200 No. 3; Dr. Gerald Dorman, Past President of the American Medical Association, *Cleveland Press*, October 24, 1969; Ohio State Medical Association by Resolution, May 14, 1970, *The Blade*, Toledo, Ohio. Ohio is the only state in the Union where such a monopoly policy may be implemented "under color" of law through the state medical board exclusively composed of members of the American Medical Association and the Ohio State Medical Association. Louisiana has no chiropractic or mixed medical board but this Court must not be confused by the case of *England v. Louisiana State Board of Medical Examiners*, which trailed through the courts, including this Court, for nearly a decade. What the chiropractors sought *there* was something they were not entitled to. Judge Wisdom made this very clear in his dissent in 263 F. 2d at 676-677. The plaintiffs in that case did not seek a license to practice chiropractic but a medical license. It was like the carpenters requesting license as plumbers. As Judge Wisdom wrote:

> "The complaint alleges that the Board of Examiners refuses to accept the plaintiffs as candidates eligible to stand an examination for a medical license, although the plaintiffs have diplomas from chiropractic schools. . . .
>
> ". . . The meaning is that the holder of such a license is a qualified surgeon and a qualified medical practitioner."

All of these criminal actions against chiropractors by the Ohio Medical Board have the same purpose, a purpose openly declared by the medical associations referred to above. The following are only a few: *Ohio v. Regina E. Lorr*, (C. P. Cuyahoga County, Ohio, Crim. Div. No. 871492; *Ohio v. Ream*, (Superior Ct. of U.S., Oct. Term, 1970, No. 70-5259); *Ohio v. Hall*, (C. P. ct. Belmont County, Ohio, No. 961 and 964); *Ohio v. Krienbrook*, (C. P. Ct. Belmont County, Ohio, No. 693); *O'Dell v. Medical Board*, (Pet. for cert. pending in U.S. Supreme Court, No. 71-5682); *Ohio v. Stocker*, C. P. Hancock County, No. 6155; *Ohio v. Gainey*, Mun. Ct. Persy County; *Ohio v. Novak*, Mun. Ct. Green County; *Ohio v. Codman*, C. P. Van Wert County; *Ohio v. Stiers*, Mun. Ct. Muskingan County; *Ohio v. Catt*, Mum. Ct. Licking County; *Ohio v. Homan*, Mun. Ct. Hardin County; *Ohio v. Young*, Mun. Ct. Mount Vernon; *Ohio v. Stewart*, Hardin County; *Ohio v. Sprague*, St. Mary's, Ohio; *Ohio v. Butler*, Bucyrus, Ohio; *Ohio v. Boyed*, Urbana, Ohio. All of these cases and many more find their source not in the purpose of procuring valid judgments but in putting chiropractic "out of business" and that the "resolution be implemented by all means available to the Ohio State Medical Association until such time as its intent is accomplished." The intent expressly avowed calls for the elimination of "all future licensing of chiropractors" in Ohio. What is most akarming is that these Resolutions and pronouncements are enforced "under color" of law by the Ohio Medical Board, the various district attorneys and the Ohio Attorney General. It is a case where the monopoly conferred by the State controls the State. There is also now pending on appeal to the United State Court of Appeal for the Sixth Circuit the class action of *Dr. Sid E. Williams et al. v. Dr. Bornemeier et al.*, No. Civ. Action 71-99, from the United States District Court of the Southern District of Ohio. The suit has been brought on by 695 chiropractic patients and the Patients' Association for Chiropractic Education composed of tens of thousands of patients and 22 chiropractic doctors and their Ohio Association. The de-

fendants are a series of individuals, the American Medical Association, the Ohio State Medical Association, and the Ohio Medical Board.

It would be a simple matter to give the chiropractic profession representation on the Ohio Medical Board. Such representation was given to the osteopaths after the decision of the Supreme Court of Ohio in 1902. *State of Ohio v. Gravett*, 65 Ohio St. 289, 62 N.E. 325, 44 L.R.A. 791. A similar argument was advanced there as was advanced in the lower court here and through this appeal. In *Gravett* it was urged that:

> "Allopaths have never been permitted to examine homeopaths; and no allopath would submit to an examination by homepathists, but both of these traditional enemies desire the privilege of examining osteopaths, and assert their right, under the Ohio medical law, to do so.
>
> "If medical practitioners can be examined only by medical men, osteopaths have the right to be examined only by osteopaths. If they are practicing medicine, they are entitled to representation on the Ohio medical board. If they are denied these privileges, they no longer enjoy equal protection of the laws.
>
> "If the board is illegally organized, it has no authority to examine anybody. If the law discriminates against the osteopaths, it is unconstitutional and void. 1 Tiedeman's State and Federal Control of Person and Property, page 249."

There are a great many competent and qualified chiropractors in the State of Ohio who moved to Ohio but are denied reciprocity which is granted to the professions represented on the medical board. They are denied license because for a chiropractor from out of State to procure a license in Ohio he must have a degree from a medical institution and two years of college work. No chiropractor can have the former qualification. In-State chiropractors only require a high school education or its

equivalent and a degree from a chiropractic college. The petitioner cannot procure a license in Ohio because he removed to Ohio after being licensed in another state. The same issue is involved in *O'Dell v. Ohio Medical Board* now pending on petition for certiorari in this Court. No. 7-5682. This violates Article IV, Section 2 of the Federal Constitution. "By all means available" the Ohio State Medical Association means that the medical board must administer the medical Act "with an evil eye" and "un equal hand" at every opportunity. *Yick Wo. v. Hopkins*, 118 U.S. 356; *Williams v. Mississippi*, 170 U.S. 356; *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552. Moreover, there is a glaring discrimination of a continuing nature between members of petitioner's profession and members of the professions represented on the medical board, in the matter of granting certificates to practice. In the respective years 1956 through 1960 for which statistics are available, 967, 836, 851, 867 and 910, allopaths, surgeons and osteopaths received certificates (536, 456, 425, 398, and 421 in the respective years by examination and 353, 320, 326, 335 and 405 by reciprocity) being 91.9%, 92.8%, 88.2%, 84.5% and 90.8%, respectively, of the total number applying. But during the same years only 5, 18, 16, 11 and 27 chiropractic certificates were issued, being 6.1%, 19%, 16.3%, 11.7% and 32.9% respectively of the number of chiropractors applying, although they were all graduates of approved chiropractic colleges. *In no instance was any chiropractor granted a certificate by reciprocity.* See Report on "Professional Licensing and Examining Boards in Ohio" Staff-Research Report No. 45 of Ohio Legislative Service Commission. The cold facts indicate that these policies to put chiropractic "out of business" in Ohio are not only violative of the Due Process Clause of the Fourteenth Amendment, but the Equal Protection Clause and Article IV, section 2, of the Federal Constitution. *The Slaughterhouse Cases*, 16 Wall. 36; *United States v. Harris*, 106 U.S. 629; *Blake v. McClung*, 172 U.S. 239; *Whitfield v. Ohio*, 297 U.S. 431.

Had the Supreme Court of Ohio granted review in the instant case it could, as it did in *State of Ohio v. Gravett*, 65 Ohio St. 289, have settled the question of discrimination and the matter might never have crossed the threshold into Federal jurisdiction. The trial court in *Gravett* had sustained the defendant's demurrer to the indictment and the Attorney General appealed to the Ohio Supreme Court. The exceptions to the sustaining of the demurrer were overruled by the Supreme Court with the following warning:

> "Authority to discriminate against osteopathy would imply authority to discriminate against any other school of medicine. It seems clear from the reasons involved and from the discussion of the subject, and the points decided in the *State v. Gardner, supra* (58 Ohio St. 599) that this discrimination against those who occupy the position of the defendant is unwarrantable, and that compliance with it can not be required."

Either the writer of the opinion had great foresight or was a better prophet than he knew for now, eighty years after that opinion, we are back where we were. The Court did recommend that the general assembly could exercise ample power to settle the question. It did, and the osteopaths were given representation on the medical board. Had the general assembly failed to remove the "unwarrantable" and unenforcible unconstitutional conditions by withholding from the osteopaths such representation on the medical board, it would then, at sometime thereafter, have been necessary to declare the statutes conferring the power, void. In *Gravett*, the Court, followed the well established rule of construction: that if there is some way that the case can be settled and the relief granted without declaring the statute void, that should be done. Another remedy could have been applied similar to that in *Hayden v. Mississippi*, (1902) 81 Miss. 291 where it was held that "The world needs and may demand that nothing good or

wholesome shall be denied from its use and enjoyment." And in *Kress & Co. v. Sharp*, — Miss. —, 126 So. 650, that chiropractors were not subject to the provisions of the Medical Act, and the same ruling in *State ex rel State Board of Medicine of the State of Idaho v. Smith*, (1959) 81 Idaho 103, 337 P. 2d 938, as to the naturopaths; *State v. Armstrong*, 38 Idaho 493, 33 A.L.R. 853 as to chiropody, or in *Berry v. Summers*, 76 Idaho 446, 283 P. 2d 1093, as to dental mechanics. Most legal scholars will agree that the failure of the State courts to settle cases that come before them on appeal could be settled adequately before their own statutes and constitutions find their way into this Court to clog the calendar which delays and betimes denies justice. The Court of Common Pleas could readily observe, *as a matter of fact*, that this was not a cause seeking a valid judgment, but one of harassment by a trade monopoly. As it stands now there may be no end to the case.

II

Except in cases of extreme emergency where the cause of Justice would be foiled, section 2937.02 of the Ohio Revised Statutes granting a hearing to a defendant when charged with a felony is mandatory. To grant a preliminary hearing to one defendant and to deny it to another would violate the Equal Protection Clause of the Fourteenth Amendment. This mandatory duty can not be taken away through the discretion of the prosecution. This right is even more important than the right to be tried on an indictment of a grand jury, and both these rights are conferred by the State and not the Federal Government. But when such rights are made mandatory by the State, the Equal Protection Clause comes into play.

Petitioner was arrested and charged with a felony. He was brought before the Findlay Municipal Court for the purpose of conducting a preliminary hearing to ascertain if there was sufficient evidence to hold him for the grand jury. In such instances, section 2937.02, of the Ohio Revised Code provides:

"Section 2937.02 *Preliminary Hearing.*

". . . the court shall, before proceeding further:

"(D) If the charge be a felony, to inform the accused of the right to a preliminary hearing."

"Section 2937.10 *Hearing set in felony cases.*

"If the charge be a felony and there be no written plea of guilty, or waiver of examination, or the court or magistrate refuses to receive such waiver, the court or magistrate, with consent of the prosecution, and the accused, may set the matter for a hearing forthwith, *otherwise* he *shall* set the matter for a hearing at a fixed time in the future and *shall* notify both prosecutor and defendant promptly of such time of hearing."

The petitioner at no time waived his right to preliminary hearing nor has petitioner as yet entered any plea, which could be construed as an implied waiver. However, before the Municipal Court could rule on the motion of petitioner, or grant a preliminary hearing, the prosecutor, deliberately, in order to deny the mandatory provisions of the statute and deprive the petitioner of the right of confrontation and cross-examination, removed the case to the secret grand jury which promptly, presented an indictment against the petitioner. The petitioner was therefore denied the opportunity to determine, in a preliminary hearing, whether any requisite probable cause existed for the search, and his arrest and prosecution and presentment to the grand jury. The Court of Appeals noting "the defendant has not been arraigned on any of the counts of either of the indictments . . ." then ruled "the second, invalidity by reason of the lack of a preliminary hearing with the show of probable cause for presentment to a grand jury, is not a defect within the meaning of R.C. 2941.02 to 2941.35 and in any event under the law of Ohio a preliminary hearing is not necessary once an indictment has been returned. *State v. Minamyer*, 12 Ohio St. 2d 67."

But *State v. Minamyer* is not in point because that case held: "Once an indictment is returned against an

accused *a plea* to such an indictment obviates the necessity for preliminary examination," which as stated above has not been entered in this case. *State v. Minamyer*, further cited *Crider v. Maxwell*, 174 Ohio St. 190. That case similary held that it is the entry of a plea which "waives any right the accused has to a preliminary hearing." Moreover, it has been universally held that the right to be heard before judicial action is a right guaranteed by the Due Process Clause of the Fourteenth Amendment. Petitioner does not contend that he has an express constitutional right as such to a preliminary hearing, in the absence of a state statute granting him that right. But he does contend that where a statute mandatorily *does* give him such a right, it is a denial of Due Process and the Equal Protection Clauses of the Constitution to be denied that right.

The Fourteenth Amendment covers the unequal enforcement of the laws as well as any enforcement of invalid laws. *East Coast Lumber Terminal v. Town of Babylon*, 174 F. 2d 106. The Due Process Clause requires that a power conferred or denied by law be exercised judicially with an honest intent to fulfill the purpose of the law and it is part of the judicial function to see that the requirement is met. *Ohio v. Meyer*, 69 Oh. App. 344, 37 N.E. 2d 637. The failure to present an accused before a magistrate contrary to statute is a denial of Due Process. *United States ex rel. Weber v. Ragen*, 176 F. 2d 579; *Goodwin v. Page*, 296 F. Supp. 1205, affd. 418 F. 2d 867. A defendant has a statutory right to a preliminary hearing which is not lost if raised before trial. *McFalls v. Peyton*, 270 F. Supp. 572.

III

The record in this case is barren of any evidence of probable cause for the search, arrest, and presentment to the grand jury. This is the result of the denial to petitioner of the preliminary hearing. The grand jury in this case

was made a tool of expediency to find an indictment without probable cause, to deny the accused the right of counsel, to confront the witnesses against him, and to learn from a hearing process whether competent evidence of probable cause was available. Not only is petitioner entitled to the establishment of probable cause under the Fourteenth Amendment, but by the Ohio statutes concerning the authority of the medical board. Section 4731.39 of the Ohio Revised Code provides:

> "Section 4731.39 *Secretary of Board shall enforce* laws.
> "The secretary of the State Medical Board shall enforce the laws relating to the practice of medicine, surgery, or midwifery. If he has knowledge of notice of a violation, he shall investigate the matter, and, *upon probable cause appearing*, file a complaint and prosecute the offender. When requested by the secretary the prosecuting attorney of the proper county shall take charge of and conduct the prosecution."

There is nothing in the record of this case or in any affidavits on which the search and arrest were made that would satisfy the Fourteenth Amendment requirements as to whether:

> (1) The secretary of the Medical Board, or his agent, the medical inspector, Kenneth Fichner, had any or valid "knowledge or notice of a violation" of the Medical Act before conducting a search.
> (2) Whether such a search actually disclosed valid evidence of probable cause before the medical board initiated this prosecution, through "the prosecuting attorney of the proper county."
> (3) Whether the warrant of arrest was issued upon any evidence of probable cause.
> (4) Whether the Presentment to the Grand Jury was founded upon evidence of the existence of probable cause.

(5) Whether the Indictment returned by the Grand Jury was based upon any competent evidence presented to them of probable cause.

The Fourth and Fourteenth Amendments to the Constitution prohibit unreasonable searches and seizures and warrants for arrest except upon probable cause. Here in the instant case there were no exigent circumstances justifying the same. *Gouled v. United States*, 255 U.S. 298; *Amos v. United States*, 255 U.S. 313.

IV

The Appellate Courts of Ohio have no authority to permit an appeal by Judicial Legislation as it did in this case and the statutes of Ohio which permit the state to appeal from an adverse judgment, and fail to provide appellate review to a defend such an adverse judgment to the state are unconstitutional and void. The Court of Appeals in Ohio is solely granted by section 2945.70 of the Ohio Revised Code Appellate jurisdiction in appeals by the state to reverse the judgment of a trial court on its ruling on a motion to quash a plea in abatement, a demurrer or a motion in arrest of judgment. In this case the Court of Appeals assumed the appellate jurisdiction granted to it by such statute. However, such statute, is the sole authority available for assumption of appellate jurisdiction by the Court of Appeals. The statute is fatally defective for the reason that section 2945.68 while permitting the trial judge to appear and defend its decision, fails to permit the petitioner, as the accused, so to do. Nowhere in the Constitution of Ohio or the Ohio statutes is appellate review allowed, where the defendant who procured the successful judgment may defend. This omission may not be cured by judicial legislation as happened in the instant case, and any attempt on the part of the appellate court to cure this omission is definitely judicial legislation, and beyond its judicial power.

Appeals by the State from orders, judgments and decrees of a trial court in a criminal case, sustaining motions to quash, or demurrers to, the indictment, are part of the trial proceedings in which a defendant, such as petitioner, is guaranteed by section 10 of Article I of the Ohio Constitution, the Sixth and Fourteenth Amendement of the Federal Constitution to appear and defend and with counsel at all stages of the proceedings. The Ohio statutes deny these rights. *Euclid v. Heaton*, 15 Ohio St. 2d 65, 80; *Eastman v. State*, 131 Ohio St. 1, 11-12; *United States v. Walker*, 346 F.2d 428; *James v. United States*, 348 F.2d 430.

When the State is given the right to appeal from an adverse judgment favorable to the defendant but the defendant is denied the right to appeal and defend the judgment with counsel, the authority given to the state to prosecute the appeal is void and of no force. Until the Ohio statutes are amended to confer this equal right to defend on the defendant such as the petitioner there can be no authorized appeal by the state. Moreover, the appellate court has no jurisdiction to confer the right and cure the omission of the Legislature. This would be judicial legislation. Under these principles the order of the Court of Appeals reversing the order of the Court of Appeals reversing the order of the Court of Common Pleas must be vacated as it was made without jurisdiction. The indictment against this petitioner must stand as dismissed or quashed as decided by the trial court. It is of no significance that the Court of Appeals attempted to cure the defect by allowing the petitioner to defend. Such authority is unauthorized. Neither the Ohio Supreme Court nor the Court of Appeals is vested with the power to supplement an Act of the Ohio Legislature so as to render it constitutional. Only the Ohio Legislature has such power, and this power the Legislature has not exercised. Until is does the right to appeal by the State of Ohio is of no force or effect.

The principle is too well settled to overthrow. Appellate Courts are created by and derive their powers from the Constitution and statutes of the State of their jurisdiction, and they have only such jurisdiction as thereby conferred. These Appellate Courts have no inherent power to entertain appeals from lower courts and cannot by their own acts acquire jurisdiction where none exists. Nor can they invest an intermediate appellate court with jurisdiction which is not conferred by the Constitution or statutes. Moreover, the Ohio courts recognize this but have failed to apply it in this case. *In re Varley's Will* (Ohio), 46 N.E. 2d 878, 880 the Court said:

> "We are urged by the brief of appellee to give consideration to the substantive rights of the appellee which will be lost if we should hold that the court erred in overruling the motion in the Common Pleas Court to dismiss the appeal. Obviously we are without power to invest the common pleas court with appellate jurisdiction which it is not given by legislative enactment. Its Appellate jurisdiction is fixed by law. . . . If it had no jurisdiction it could not entertain the appeal on questions of law and fact."

It is submitted that where, as here, the Act (Section 2945.67 et seq. Ohio Revised Code) ostensibly vesting appellate jurisdiction on the Court of Appeals is a nullity because it deprives the petitioner of his constitutional right to appeal and defend in such appeal and jurisdiction of a court cannot be waived or stipulated. Unquestionably, the Court of Appeals in this case had no jurisdiction to hear the appeal at all and it certainly had no inherent power to acquire such appellate jurisdiction by its own act of supplying the constitutional deficiency of the act, and itself discretionarily allowing the petitioner to appeal and defend. Jurisdiction on appeal may not be conferred by consent or waiver.

V.

Under section 4731.02 of the Ohio Revised Code, the secretary of the Ohio Medical Board must be "a physician in good standing in his profession." This means nothing less than that he must conform to the policies of both the American Medical Association and the Ohio State Medical Board, obey their mandates, with particular emphasis on the purposes of express Resolutions of the Houses of Delegates of both associations. We have already stated the intent and purposes of these Resolutions, to "put chiropractic out of business." The former secretary of the Board testified in the first trial of this petitioner that he had never made any study of chiropractic or its principles and would be incompetent to judge its merits or conduct any competent examination of chiropractors. The same is true of all the members of the Board present and past. Despite the wording of the Resolutions that chiropractic must be "put out of business," by "all means available until the intent is accomplished," actually the only "means" thus far employed has been that conducted by the members of the Ohio Medical Board. It is unfortunate that several district attorneys and the Ohio Attorney General have, consciously or unconsciously, become accomplices in this campaign. Without the aid of the medical board in implementing the purpose and intent of these Resolutions "under color" of law by instigating criminal prosecutions against the school of the healing art they seek to destroy, the Resolutions would be a complete failure. If the chiropractors had representation on the medical board, and chiropractors were examined by members of their own school, the allopaths and surgeons on the Board would be helpless to aid in the intent of the Resolutions. But these allopaths realize what happened with the osteopaths after the decision by the Ohio Supreme Court in *State v. Gravett*, 65 Ohio St. 289. This was, of course, in 1902 when the trade

monopolies were not so powerful and the Fletcher Report had injected into the medical profession a grain of honesty.

CONCLUSION

In the light of all the evidence in this case, the public interest that is involved, and the substantial constitutional questions presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK O. WALTHER
Attorney for the Petitioner.

APPENDIX

CONSTITUTION
of the
UNITED STATES OF AMERICA

ARTICLE 4

STATE AND TERRITORIAL RELATIONS

Section
1. Full faith and credit to records and judicial proceedings of states.
2. Privileges and immunities—Fugitives from justice and service.
3. Admission of states—Rules and regulations respecting the territory and property of the United States.
4. Guaranty of republican form of government and against invasion.

Section 1. [Full faith and credit to records and judicial proceedings of states.]—Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [Privileges and immunities—Fugitives from justice and service.]—[1]. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED STATUTES

Chapter 4731

§4731.01 State medical board. (GC §1262)

The governor, with the advice and consent of the senate, shall appoint a state medical board consisting of eight members who shall be physicians and surgeons licensed to practice in Ohio. Seven members of the board shall hold the degree of doctor of medicine and shall be appointed for terms of seven years. One member of the board shall hold the degree of doctor of osteopathy and shall be appointed for a term of four years.

HISTORY: GC §1262; 99 v 496, §19; 120 v 134, §1. Eff. 10-1-53. Analogous to RS §4403.

§4731.09 Requirements for admission. (GC §1270)

The state medical board shall appoint an entrance examiner who shall not be directly or indirectly connected with a medical college and who shall determine the sufficiency of the preliminary education of an applicant for admission to the examination. The minimum requirement shall be two years of collegiate work in an approved college of arts and sciences in addition to high school graduation. Provided that students already matriculated and enrolled in their professional colleges shall not be required to have the two years of college work but shall comply only with the preliminary requirements as existing and in effect at the time of their enrollment in their said colleges. In the absence of the foregoing qualifications, the entrance examiner may examine the applicant to overcome deficiencies. When the entrance examiner finds the preliminary education of the applicant sufficient, he shall issue a certificate of preliminary examination upon the payment to the treasurer of the board of a fee of three dollars. Such certificate shall be attested by the secretary.

The applicant must also produce a diploma from a medical institution in the United States in good standing as defined by the board at the time the diploma was issued or produce a diploma from a school or college of osteopathy in the United States in good standing at the time the diploma was issued as defined by a committee consisting of the superintendent of public instruction of the state, a member of the board who holds the degree of doctor of medicine and a member of the board who holds the degree of doctor of osteopathy, or a diploma or license approved by the board which conferred the full right to practice all branches of medicine or surgery in a foreign country.

However, a person holding a diploma approved by the board which does not confer on him the full right to practice all branches of medicine or surgery in a foreign country may in the discretion of the board be admitted to the examination upon completion of a course of training approved by the board consisting of not less than twelve months of residency or internship in a hospital in the United States.

An applicant for a license to practice osteopathic medicine and surgery who is a licensed osteopathic physician or surgeon in this state and who is now practicing in Ohio, but who does not possess the minimum preliminary education required, shall be issued the credentials set forth in this section, provided he has been in practice in Ohio for a period of not less than five years and submits evidence, or affidavits, acceptable to the committee that he has taken postgraduate instruction, amounting in the aggregate to, thirty-six weeks in a medical or osteopathic school or college or in a hospital. Credit shall be allowed such applicant for collegiate work in an approved school of arts and sciences and for hospital internship.

§4731.15 Examination and registration of practitioners of limited branches of medicine or surgery. (GC §1274-1).

The state medical board shall also examine and regis-

ter persons desiring to practice any limited branch of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include chiropractic, naprapathy, spondylotherapy, mechanotherapy, neuropathy, electrotherapy, hydrotherapy, suggestivetherapy, psychotherapy, magnetic healing, chiropody, Swedish movements, massage, and such other branches of medicine or surgery as the same are defined in section 4731.34 of the Revised Code, except midwifery and osteopathy.

HISTORY: GC §1274-1; 106 v 202. Eff. 10-1-53.

§4731.39 Secretary of board shall enforce laws (GC §1295)

The secretary of the state medical board shall enforce the laws relating to the practice of medicine, surgery, or midwifery. If he has knowledge or notice of a violation, he shall investigate the matter, and, upon probable cause appearing, file a complaint and prosecute the offender. When requested by the secretary, the prosecuting attorney of the proper county shall take charge of and conduct such prosecution.

HISTORY: GC §1295; 99 v 503, §59. Eff. 10-1-53. Analogous to RS §4403g.

Research Aids

Persons authorized to enforce provisions:

O-Jur: Physicians §110

Am-Jur: Physicians §§67, 68

§4731.40 Distribution of fines collected. (GC §12699)

All fines collected for violation of sections 4731.41 to 4731.45, inclusive of the Revised Code, shall be distributed as follows: one half to the state medical board and one half to the treasury of the county or municipal corporation in which the offense was committed.

§4731.41 Practice of medicine or surgery without certificate. (GC §12694)

No person shall practice medicine or surgery, or any of its branches without a certificate from the state medical board; no person shall advertise or announce himself as a practitioner of medicine or surgery, or any of its branches, without a certificate from the board; no person not being a licensee shall open or conduct an office or other place for such practice without a certificate from the board; no person shall conduct an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches; and no person shall practice medicine or surgery, or any of its branches, after a certificate has been revoked, or, if suspended, during the time of such suspension.

A certificate signed by the secretary to which is affixed the official seal of the board to the effect that it appears from the records of the board that no such certificate to practice medicine or surgery, or any of its branches, in the state has been issued to any such person specified therein, or that a certificate, if issued, has been revoked or suspended, shall be received as prima-facie evidence of the record of such board in any court or before any officer of this state.

CHAPTER 2937: PRELIMINARY EXAMINATION

§2937.02 Announcement of charge and rights of accused by court.

When, after arrest, the accused is taken before a court or magistrate, or when the accused appears pursuant to terms of summons or notice, the affidavit or complaint being first filed, the court or magistrate shall, before proceeding further:

(A) Inform the accused of the nature of the charge against him and the identity of the complainant and permit

the accused or his counsel to see and read the affidavit or complaint or a copy thereof;

(B) Inform the accused of his right to have counsel and the right to a continuance in the proceedings to secure counsel;

(C) Inform the accused of the effect of pleas of guilty, not guilty, and no contest, of his right to trial by jury, and the necessity of making written demand therefor;

(D) If the charge be a felony, inform the accused of the nature and extent of possible punishment on conviction and of the right to preliminary hearing. Such information may be given to each accused individually or, if at any time there exists any substantial number of defendants to be arraigned at the same session, the judge or magistrate may, by general announcement or by distribution of printed matter, advise all those accused concerning those rights general in their nature, and informing as to individual matters at arraignment.

§2937.10 Hearing set in felony cases.

If the charge be a felony and there be no written plea of guilty or waiver of examination, or the court or magistrate refuses to receive such waiver, the court or magistrate, with the consent of the prosecutor and the accused, may set the matter for hearing forthwith, otherwise he shall set the matter for hearing at a fixed time in the future and shall notify both prosecutor and defendant promptly of such time of hearing.

HISTORY: 128 v 97 (106), §1. Eff. 1-1-60.

§2945.67 Exceptions by the prosecution.

The prosecuting attorney, *solicitor*, or the attorney general may except to a decision of the court and present a bill of exceptions thereto. The court shall sign said bill and it shall be made a part of the record.

HISTORY: 131 v 682. Eff. 11-1-65.

For discussion, see Schneider TEXT §§12.6, 12.7, 21.1, 21.2, 21.5, 34.23.

§2945.68 Application to file bill of exceptions.

The prosecuting attorney, *solicitor*, or the attorney general may present a bill of exceptions in [illegible]minal action to the court of appeals or the supreme court and apply for permission to file it with the clerk of the court for the decision of such court upon the points presented therein. Prior thereto, he shall give reasonable notice to the judge who presided at the trial in which such bill was taken, of his purpose to make such application. If the court of appeals or the supreme court allows the bill to be filed, the prosecuting attorney, *solicitor*, or attorney general shall, within ten days of the filing of the bill, file his brief in support of such exceptions and forthwith serve a copy thereof upon the trial judge and any attorney appointed by the judge to argue the exceptions against the prosecuting attorney, *solicitor*, or the attorney general.

INDICTMENT—THREE COUNTS

THE STATE OF OHIO
Hancock County, ss. } COURT OF COMMON PLEAS

Of the Term January in the year of our Lord, one thousand nine hundred and seventy.

The Jurors of the Grand Jury of said County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Frank Ream, Forest, Ohio, late of said County, on or about the 14th day of October in the year of our Lord one thousand nine hundred and sixty-nine at the County of Hancock aforesaid, did, knowingly, wilfully and unlawfully practice medicine or surgery, or any of its branches, without a certificate from the State Medical Board of the State of Ohio,

SECOND COUNT: And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said Frank Ream, Forest, Ohio, late of said Hancock County, on/or about the 14th day of October in the year of our Lord, one thousand nine hundred and sixty-nine at the County of Hancock aforesaid, not being a licensee, knowingly, wilfully and unlawfully did open or conduct an office or other place for the practice of medicine or surgery, or any of its branches, without a certificate from the State Medical Board of the State of Ohio,

THIRD COUNT: And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said Frank Ream, Forest, Ohio late of said Hancock County, on or about the 14th day of October in the year of our Lord one thousand nine hundred and sixty-nine at the County of Hancock aforesaid, did knowingly, wilfully and unlawfully conduct an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches, to-wit: Gary W. Stocker, the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

ORDER QUASHING INDICTMENT

July 6, 1970

Mr. Richard J. Rinebolt
Prosecuting Attorney
First National Bank Bldg.
Findlay, Ohio 45840

Mr. Frank O. Walther
Attorney at Law
130 Booth Lane
Haverford, Pa. 19041

IN RE: State vs. Ream
#6155 & 6162
State vs. Stocker
#6154 & 6163

Mr. Robert W. Scott
Attorney at Law
4301 Woodville Road
Toledo, Ohio 43616

Gentlemen:

Please be advised that the Court entered the following minutes on its docket this date:

"7/6/70—The Court having taken under advisement after argument motion to quash indictments and demur to the indictments, upon consideration, motion to quash #6155 & 6162 sustained, the Court being of the opinion that Hardin County #5010 & Court of Appeals #511 is a prosecution for the same offense as herein charged. The underlying idea, one that is deeply engrained in the Anglo-American System of Jurisprudence, is that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense; it will be subjecting him to harassment, expense, etc." 35 US 184, P. 187. Demur to indictments #6154 & 6163 and motions, overruled. Exceptions. See Entry."

Defense counsel to prepare entry on Ream Case; Prosecution to prepare entry on Stocker Case. Counsel will be advised of arraignment date in Stocker Case.

Very truly yours,

Joe M. Moorhead,
Judge

JMM gwsj

IN THE COURT OF APPEALS, THIRD APPELLATE
JUDICIAL DISTRICT OF OHIO
HANCOCK COUNTY, OHIO

STATE OF OHIO,
PLAINTIFF-APPELLANT,
vs.
FRANK J. REAM,
DEFENDANT-APPELLEE

CASE NOS. C.A. 754, 755

JOURNAL ENTRY

This day this matter came on to be heard on the application of the Prosecuting Attorney of Hancock County, Ohio for permission to file a Bill of Exceptions to the decision of the Common Pleas Court of Hancock County, Ohio, under the provisions of Section 2945.67 et seq. of the Ohio Revised Code, which application was originally filed September 21, 1970 and re-filed November 6, 1970.

The Court finds said application to be well taken, and hereby allows the Bill of Exceptions to be filed concurrently with the entry of this order. Further, to avoid unnecessary expense, the filing of one Bill of Exceptions in Court of Appeals Case No. 754 shall constitute the filing of the Bill of Exceptions in both Court of Appeals Cases No. 754 and 755.

It is the further order of the Court that the Clerk shall certify a copy of this entry to counsel who represented the Defendant in the trial court which shall constitute notice to the Defendant and his counsel that Defendant is entitled to participate as a party-appellee in all further proceedings under said statutory provisions.

The Clerk shall also certify a copy of this entry to the trial Judge which shall constitute notice to him of his discretionary right to appoint some competent attorney to argue the Bill of Exceptions against the Prosecuting At-

torney as provided by Section 2945.69 of the Ohio Revised Code.

/s/ Ralph D. Cole, Jr.
/s/ Raymond A. Younger
/s/ J. Thomas Guernsey
Judges

APPROVED:
/s/ Richard J. Rinebolt,
Attorney for Plaintiff-Appellant

PERMISSION TO FILE BILL OF EXCEPTIONS

This day this matter came on to be heard on the application of the Prosecuting Attorney of Hancock County, Ohio for permission to file a Bill of Exceptions to the decision of the Common Pleas Court of Hancock County, Ohio, under the provisions of Section 2945.67 et seq. of the Ohio Revised Code, which application was originally filed September 21, 1970 and re-filed November 6, 1970.

The Court finds said application to be well taken, and hereby allows the Bill of Exceptions to be filed concurrently with the entry of this order. Further, to avoid unnecessary expense, the filing of one Bill of Exceptions in Court of Appeals Case No. 754 shall constitute the filing of the Bill of Exceptions in both Court of Appeals Cases Nos. 754 and 755.

It is the further order of the Court that the Clerk shall certify a copy of this entry to counsel who represented the Defendant in the trial court which shall constitute notice to the Defendant and his counsel that Defendant is entitled to participate as a party-appellee in all further proceedings under said statutory provisions.

The Clerk shall also certify a copy of this entry to the trial Judge which shall constitute notice to him of his discretionary right to appoint some competent attorney to argue the Bill of Exceptions against the Prosecuting Attorney as provided by Section 2945.69 of the Ohio Revised Code.

/s/ Ralph D. Cole, Jr.
/s/ Raymond A. Younger
/s/ J. Thomas Guernsey
JUDGES

APPROVED:

/s/ Richard J. Rinebolt
Attorney for Plaintiff-Appellant

ORDER REVERSING JUDGMENT AND VACATING DEMURRER

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY

(ORIGINAL HEREOF WAS FILED WITH THE CLERK OF COURTS OF HANCOCK COUNTY ON JULY 1, 1971)

STATE OF OHIO,
PLAINTIFF-APPELLANT,
vs.
FRANK J. REAM,
DEFENDANT-APPELLEE.

Case No. 754

MINUTES

TO THE CLERK:

In the above entitled action, enter the following minutes on the Court of Appeals docket as of July 1, 1971, to-wit:

MOTION OF ATTORNEY FOR COMMON PLEAS JUDGE TO DISMISS THE APPEAL OVERRULED.

FIND ERROR OF THE COMMON PLEAS COURT PREJUDICIAL TO THE STATE OF OHIO IN ITS JUDGMENT QUASHING THE INDICTMENT AND DISCHARGING THE DEFENDANT FROM PROSECUTION THEREON. JUDGMENT REVERSED AND VACATED AND CAUSE REMANDED TO THE COMMON PLEAS COURT WITH INSTRUCTIONS TO OVERRULE THE MOTION TO VACATE AND THE DEMURRER AND FOR FURTHER PROCEEDINGS AS PROVIDED BY LAW.

COSTS TO ABIDE FINAL DETERMINATION.

EXCEPTIONS SAVED.

MEMORANDUM OPINION FILED.

(HOFSTETTER, J., of the Eleventh Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

/s/ J. Thomas Guernsey
/s/ Ralph D. Cole, Jr.
/s/ Edwin T. Hofstetter
Judges

MEMORANDUM OPINION

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO, HANCOCK COUNTY

STATE OF OHIO,
PLAINTIFF-APPELLANT,

vs

FRANK J. REAM,
DEFENDANT-APPELLEE.

CASE NUMBER 754

STATE OF OHIO,
PLAINTIFF-APPELLANT,

vs

FRANK J. REAM,
DEFENDANT-APPELLEE.

CASE NUMBER 755

MEMORANDUM OPINION

Decided: July 1, 1971.

RICHARD J. RINEBOLT, Prosecuting Attorney, for Appellant.

FRANK O. WALTHER and ROBERT W. SCOTT, for Appellee.

ALLAN M. DAVIS, for the Trial Judge.

GUERNSEY, J. (Presiding). Case number 754 is an appeal by the prosecuting attorney from case number 6155 in the Court of Common Pleas of Hancock County wherein the defendant was indicted on three counts in that on or about October 14, 1969, he:

1. "did, knowingly, wilfully and unlawfully practice medicine or surgery, or any of its branches, without a certificate from the State Medical Board of the State of Ohio, Contrary to section 4731.41 of the Revised Code of Ohio."

2. "not being a licensee, knowingly, wilfully and unlawfully did open or conduct an office or other place for the practice of medicine or surgery, or any of its branches, without a certificate from the State Medical Board of the State of Ohio, Contrary to section 4731.41 of the Revised Code of Ohio," and
3. "did knowingly, wilfully and unlawfully conduct an office in the name of some person who has a certificate to practice medicine or surgery, or any of its branches, to-wit: Gary W. Stocker, Contrary to section 4731.41 of the Revised Code of Ohio."

Case number 755 is an appeal by the prosecuting attorney from case number 6162 in the same court wherein the same defendant was indicted on three identical counts, except that they were charged to have occurred on or about October 28, 1969.

In each case the defendant filed a motion to quash and set aside the indictment alleging that (1) the second and third counts are inconsisteint and conviction of one would be a bar to conviction of the other, (2) if used in support of a charge of felony then the indictment is invalid by reason of the denial of defendant of his right to a preliminary hearing with a showing of probable cause for presentment to a grand jury, and (3) that the indictment is founded upon an unconstitutional statute.

At the same time the defendant filed in each case a demurrer to the indictment alleging that R.C. 4731.41 "is unconstitutional and void, being in violation of his and their [defendant and other members of the chiropractic profession] rights to practice his and their profession, guaranteed to him and them under Article I, section 1 of the Bill of Rights of the Ohio Constitution and the Fourteenth and Fifth Amendments to the United States Constitution."

The defendant has not been arraigned on any of the counts of either of the indictments and the cases were

heard by the Court of Common Pleas on the motions to quash and the demurrers thus filed.

After hearing the common pleas court found the motions to quash well taken "on the grounds that case number 5010 of the Court of Common Pleas of Hardin County and case number 511 in the Court of Appeals of the Third Appellate District are a prosecution against Defendant for the same offense as therein charged in such Indictments, presented against Defendant, . . . inasmuch as the 'underlying idea, one that is deeply engrained in the Anglo-American system of Jurisprudence, is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense; it will be subjecting him to harrassment, expense, etc.' 355 U.S. 184, 187." Thereupon judgments were entered quashing the indictments and ordering the defendant discharged from further prosecution thereunder. It is from each of these judgments that the prosecuting attorney made his application to this Court under the provisions of R.C. 2945.67, et seq., for permission to file his bill of exceptions, which application was granted. He assigns as error that the action of the trial court in sustaining the defendant's motions to quash and set aside the indictments was not in compliance with R.C. 2941.54.

We will first, however, dispose of the matter of defendant's demurrers to the indictments. Under R.C. 2941.57 it is prescribed that the accused may demur to an indictment "(A) When the facts stated in the indictment do not constitute an offense punishable by the laws of this state; (B) When the intent is not alleged and proof thereof is necessary to make out the offense charged; (C) When it appears on the face of the indictment that the offense charged is not within the jurisdiction of the court."

Although the trial court did not specifically rule upon the demurrers of the defendant it appears that the only claim under his demurrers is that the statute under which the indictments were founded, R.C. 4731.41, is

unconstitutional and void; in other words, that the facts stated in the indictments do not constitute an offense punishable by the laws of this state. In State v. Ream, case number 511 in the Court of Appeals of Hardin County, the same claim was made by the same defendant as here and was rejected by this court on August 28, 1970, by its decision affirming Ream's conviction in that case. It is unlikely that this decision could have been known to the Common Pleas Court of Hancock County when its judgment herein was entered on August 31, 1970. The Hardin County case was thereafter appealed by defendant to the Supreme Court of Ohio and that court refused to review the decision of this court. It is, therefore, established in this appellate district that R.C. 4731.41 is not an unconstitutional and void enactment and, in this state of the law, defendant's demurrers could not have been sustained for that reason.

Coming then to the motions to quash it is to be observed that R.C. 1941.54 prescribes that "a motion to quash may be made when there is a defect *apparent upon the face of the record*, within the meaning of sections 2941.02 to 2941.35, inclusive, of the Revised Code, including defects in the form of the indictment and in the manner in which the offense is charged." (Emphasis added.)

As hereinbefore noted the defendant assigned three reasons for quashing the indictments. The first, the inconsistency of the second and third counts, if an inconsistency at all, is not ground to quash either of such counts, does not prevent trial as to both, but would merely prevent conviction as to both. State v. Johnson, 112 Ohio App. 124, 16 O.O. 2d 51. The second invalidity by reason of the lack of a preliminary hearing with a showing of probable cause for presentment to a grand jury, is not a defect within the meaning of R.C. 2941.02 to 2941.35, and, in any event, under the law of Ohio a preliminary hearing is not necessary once an indictment has been returned. State v. Minamyer, 12 Ohio St. 2d 67. The third assigned

reason, that the indictments are founded on an unconstitutional statute, has been disposed of in our discussion of the demurrers.

The reason for quashing the indictments found by the court, apparently a misconceived concept of double jeopardy, was wholly outside of the proper consideration by the court on either the motions to quash or on the demurrers to the indictments. Double jeopardy is a matter of defense which may be raised only by proper and special plea following arraignment. If issue is joined on such plea it must be tried to a jury. R.C. 2943.03, 2943.05 and 2943.06, et seq. Here there had been no arraignment, no plea of once in jeopardy, and no trial to a jury on the issue. It was wholly beyond the authority of the court on a hearing on motions to quash the indictments to quash same on a supposed reason that he was being prosecuted in Hancock County for the same offense for which he had been convicted in Hardin County. Indeed, though same is not really in issue in this appeal, an indictment charging the *commitment* of an offense (or offenses) in one county could not possibly charge the same offense (or offenses) which the defendant had been found guilty of *committing* in another county. The situs of the offenses being different the offenses necessarily had to be different.

We must thus conclude that the common pleas court committed error prejudicial to the State of Ohio in its judgments quashing the indictments and discharging the defendant from prosecution.

Judgments reversed.

Cole and Hofstetter, JJ., concur.

(Hofstetter, J., of the Eleventh Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1971 TERM*
City of Columbus. *To wit:* March 3, 1971
State of Ohio,
Appellee,

vs.

Frank J. Ream,
Appellant.

No. 70-738
APPEAL FROM THE
COURT OF APPEALS
for Hancock County

This cause, here on appeal as of right from the Court of Appeals for HANCOCK County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the FINDLAY MUNICIPAL COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HANCOCK County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1971 TERM*
City of Columbus. *To wit:* *March 3, 1971*
State of Ohio,

Appellee,

vs.

Frank J. Ream,
Appellant.

No. 70-738

MANDATE

To the Honorable COMMON PLEAS COURT
Within and for the County of HANCOCK, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

..... 19 .....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee ..... *$20.00 Paid by* Frank O. Walther

IN THE COURT OF APPEALS, THIRD APPELLATE JUDICIAL DISTRICT OF OHIO HANCOCK COUNTY, OHIO

STATE OF OHIO, PLAINTIFF-APPELLANT, vs. FRANK J. REAM, DEFENDANT-APPELLEE

CASE NOS. C.A. 754, 755

JOURNAL ENTRY

The Court finds the Motion of the Attorney for the Common Pleas Judge of Hancock County, Ohio to dismiss said appeal is not well taken and the same is hereby overruled.

The Court further finds error of the Common Pleas Court of Hancock County, Ohio, prejudicial to the State of Ohio in its judgment quashing the Indictment and discharging the Defendant from prosecution thereon. Said judgment is reversed and vacated and said cause remanded to the Common Pleas Court of Hancock County, Ohio, with instructions to overrule the Motion To Vacate and the Demurrer and for further proceedings as provided by law.

Costs to abide final determination.

Exceptions saved.

/s/ J. Thomas Guernsey
/s/ Edwin T. Hofstetter
/s/ Ralph D. Cole, Jr.
Judges

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

HANCOCK COUNTY

THE STATE OF OHIO, PLAINTIFF-APPELLANT, vs FRANK J. REAM, DEFENDANT-APPELLEE.	Case No. 754 MINUTES

TO THE CLERK:

In the above entitled action, enter the following minutes on the Court of Appeals docket as of August 19, 1971, to-wit:

MOTION OF APPELLANT TO CERTIFY RECORD TO SUPREME COURT FOR REVIEW AND FINAL DETERMINATION FOR ALLEGED CONFLICT WITH STATE V. JOHNSON, 112 Ohio App., 124, OVERRULED.

(MEMO.: The decision in the Johnson case precludes a defendant from being charged *and found guilty* at one trial of two offenses when, if tried separately, conviction of one offense would be a bar to conviction thereafter of the other. Here, if the conviction of one offense would be a bar to conviction of the other, which we have not decided, the defendant has not at one trial been charged *and found guilty* of two such offenses. In fact, he has not been tried at all nor been found guilty of any offense.)

(HOFSTETTER, J., of the Eleventh Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

/s/ Thomas Guernsey

/s/ Ralph D. Cole, Jr.

/s/ Edwin T. Hofstetter

Judges

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1971 TERM*
City of Columbus. *To wit:* *November 26, 1971*

State of Ohio,
Appellee,
vs.
Frank J. Ream,
Appellant,

No. 71-648
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for HANCOCK County.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Frank D. Walther.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 9th day of December, 1971.

/s/ Thomas L. Startzman, *Clerk*
/s/ Sam F. Adkins, *Deputy*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1971 TERM*
City of Columbus. *To wit:* *November 26, 1971*

State of Ohio,
Appellee,
vs.
Frank J. Ream,
Appellant.

No. 71-648
APPEAL FROM THE COURT OF APPEALS

for Hancock County

This cause, here on appeal as of right from the Court of Appeals for HANCOCK County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HANCOCK County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 4th day of December, 1971.

/s/ Thomas L. Startzman, *Clerk*
/s/ Sam F. Adkins, *Deputy*